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No. 09-1218

Supreme Court, U.S.
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In The
Supreme Court of the United States

CORLINE ALLEN, Individually and on behalf of all others similarly situated; ALL PLAINTIFFS; LORENZO ARGUIRRE; THEOTIS ANDERSON; GERARDO AVALOS; ET AL.,

Petitioners,

v.

MCWANE, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Fair Labor Standards Act mandates covered employers to pay to employees minimum wage and overtime for hours of work. 29 U.S.C. §§ 206-207 (2006). Section 203(o) of the Act excludes from "hours worked" time spent "changing clothes or washing at the beginning or end of each workday" when such activities are "excluded from measured working time during the week involved by the express terms of or by custom or practice under a bona fide collective-bargaining agreement applicable to the particular employee." 29 U.S.C. § 203(o).

In its opinion, the Fifth Circuit specifically identified and discussed a conflict between the Third and Eleventh Circuits and the Ninth Circuit regarding the burden of proof to establish a "custom or practice" under a collective bargaining agreement. This Court has previously stated the elements of a custom or practice under a collective bargaining agreement, and Petitioners believe that the Fifth Circuit's opinion presents conflicts with that precedent and other intervening precedent.

The questions presented are:

I. What are the elements of proof to establish a "custom or practice" under a collective bargaining agreement, and which party, employer or employee, bears the burden of proof under Section 203(o)?

II. Whether the court of appeals below erred in holding that a Section 203(o) "custom or practice" was established on the undisputed facts of this record?

LIST OF PARTIES TO THE PROCEEDING

Due to the large number of parties involved in this case, a list of parties to the proceeding will be filed as a separate document.

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PETITION FOR WRIT OF CERTIORARI

Petitioners Corline Allen, et al., respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the Fifth Circuit is published at 593 F.3d 449. Pet. App. 1.[1] The opinion of the district court and the report and recommendation of the magistrate judge are unpublished. Pet. App. 24 and 26.

JURISDICTION

The Fifth Circuit issued its opinion and judgment in this case on January 8, 2010. A petition for a writ of certiorari was filed on April 8, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS AND RULES

Section 203(o) of the Fair Labor Standards Act ("FLSA") reads:

> (o) Hours Worked.--In determining for the purposes of sections 206 and 207 of this title the hours for which an employee is employed, there shall be excluded any time spent in changing

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[1] All references to "Pet. App." are to the appendix filed by Petitioners.

> clothes or washing at the beginning or end of each workday which was excluded from measured working time during the week involved by the express terms of or by custom or practice under a bona fide collective-bargaining agreement applicable to the particular employee.

29 U.S.C. § 203(o) (2006).

Rule 56(c), Fed. R. Civ. P. (2006), requires a district court to grant summary judgment when the pleadings and evidence "show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law."

STATEMENT OF THE CASE

Two thousand one hundred fifty employees, working at steel foundries in ten states, seek unpaid overtime from their employer. For many years, their employer has required petitioners to spend significant time each day donning and doffing personal protective gear and completing other activities, but the employer did not compensate them for the time. A large majority of the employees are covered by collective bargaining agreements made with their employer. This appeal involves the employee petitioners' claim for compensation and the employer respondent's invocation of Section 203(o) of the FLSA, a provision of the Act addressing collective bargaining, to avoid payment for time spent donning and doffing personal protective gear.

1. Background: This Court's Decision in *Alvarez* Established that Donning and Doffing Protective Gear Can Start the FLSA Continuous Workday.

On November 8, 2005, this Court issued its decision in *IBP, Inc. v. Alvarez*, 546 U.S. 21 (2005), holding that the portal-to-portal provisions of the FLSA did not bar payment for donning and doffing of protective gear when such protective gear was "integral or indispensable" to a "principal activity." *Id.* at 35-37.

Reiterating its holding in *Steiner v. Mitchell*, 350 U.S. 247, 256 (1956), this Court stated that:

> [A]ctivities, such as the donning and doffing of specialized protective gear, that are performed either before or after the regular work shift, on or off the production line, are compensable under the portal-to-portal provisions of the Fair Labor Standards Act if those activities are an integral and indispensable part of the principal activities for which covered workmen are employed and are not specifically excluded by [the portal-to-portal provisions].

Alvarez, 546 U.S. at 30.

Most significantly, however, *Alvarez* clarified, for the first time, that donning and doffing protective gear can start and stop the compensable "continuous

workday" under the FLSA. *Id.* at 37 ("Moreover, during a continuous workday, any walking time that occurs after the beginning of the employee's first principal activity and before the end of the employee's last principal activity is excluded from the scope of that provision, and as a result is covered by the FLSA.").

2. Plaintiffs' Claim.

Plaintiffs are 2,150 named and opt-in claimants who are hourly workers at ten McWane, Inc. cast iron pipe and fitting foundries across the United States. *See* Pet. App. 2-3 (identifying locations and collective bargaining agreement periods).

Foundries require a high degree of precaution to operate safely. One such precaution is personal protective equipment worn by employees.

The Plaintiffs here don and doff personal protective equipment, as expressly required by McWane, Inc. company policy, procedures and rules and as required by law, which can include:

> Hard hats, earplugs, safety glasses with side shields, prescription safety glasses with side shields, gloves, aprons, rain gear, paper suits, rubber steel-toed boots, steel-toed boots or steel-toed shoes with metatarsal guards, heat jackets, flame-resistant jackets, disposable coveralls, face shields, spats, back braces, wrist braces, aluminized

> clothing and metatarsal shoes, paper masks, flame retardant hoods, flame retardant sleeves, flame retardant leggings, cutter shirts, respirators, helmets, and chaps.

Pet. App. 42.[2]

The 2,150 Plaintiffs have not been paid for donning and doffing required personal protective equipment. Nor have they been paid for any other preliminary or postliminary activity in between donning or doffing and their designated shift time.

This Court's decision in *Alvarez* in 2005 gave Plaintiffs notice for the first time that their donning and doffing required personal protective equipment and other preliminary and postliminary activities may be compensable as part of the FLSA continuous workday. Pet. App. 42.

On April 13, 2006, Plaintiffs filed this cause of action, seeking payment for their hours worked, and specifically seeking payment for work preliminary and postliminary to shift time as integral and indispensable to a principal activity and part of the continuous workday. Pet. App. 3. The district court had jurisdiction pursuant to 28 U.S.C. § 1331 (2006).

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[2] The exact personal protective equipment worn varies depending on job responsibility. However, all Plaintiffs don at least hard hats, steel-toed boots, safety glasses, and ear plugs. Pet. App. 3. Numerous Plaintiffs, particularly those engaged in pouring and forming, don full body protection. There is no evidence in the record as to exactly how many employees are required to don and doff more than the minimum personal protective equipment, but it is known to be significant.

Plaintiffs requested certification of a collective action pursuant to 29 U.S.C. § 216(b) (2006), and the request was conditionally granted by the district court on November 7, 2006. *Id.*

3. McWane's § 203(o) Motion.

On August 23, 2007, McWane, Inc. ("McWane") filed its First Motion for Summary Judgment pursuant to 29 U.S.C. § 203(o) ("§ 203(o) motion").[3] McWane alleged that it had proven a "custom or practice [of nonpayment] under a bona fide collective-bargaining agreement" as a matter of law, and therefore, the portion of Plaintiffs' claim regarding "clothes changing" time was not compensable under the FLSA.[4]

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[3] A small number of Plaintiffs are not covered by a collective bargaining agreement. They are not subject to dismissal under Section 203(o) and they are not participating in the instant appeal.

[4] Donning and doffing personal protective equipment is "clothes changing" under the precedent of the Fifth Circuit, which is also the position taken by the Department of Labor, and Plaintiffs do not contest that issue. Pet. App. 9.

In the motion and subsequent pleadings,[5] the parties did not dispute the following three facts, which proved dispositive to the lower courts:

a. Plaintiffs have not been paid for time spent donning and doffing personal protective equipment at the beginning and end of their work shifts. Pet. App. at 4, 41-43.

b. With respect to the dates when Plaintiffs are claiming hours worked, the applicable collective bargaining agreements are silent on the issue of whether time spent donning and doffing personal protective equipment is compensable. Pet. App. at 4, 41-43.

c. Payment for donning and doffing personal protective equipment was never discussed by Plaintiffs in union or employee meetings or with McWane managers, including meetings in which the applicable collective bargaining

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[5] The issues of whether donning and doffing the personal protective equipment here are "integral and indispensable" to a "principal activity" or otherwise "work," to the extent those avenues remain open to challenge, do not concern the Court in reviewing this summary judgment, which is limited to Section 203(o). The fact that the activities in question are "hours worked" within the meaning of the FLSA must be presumed at this stage, as the motion for summary judgment merely asserts Section 203(o)'s exclusion from otherwise compensable time.

agreements were negotiated. Pet. App. at 4, 41-43.

On August 25, 2008, the magistrate judge issued his report and recommended that the § 203(o) motion be granted. Pet. App. 26-39. On September 24, 2008, the district court overruled Plaintiffs' objections to the magistrate judge's report and recommendation, adopted the recommendations in full, and entered a judgment pursuant to Fed. R. Civ. P. Rule 54(b). Pet. App. 24-25. Plaintiffs appealed, and the court of appeals affirmed the judgment of the district court. Pet. App. 22-23.

REASONS FOR GRANTING CERTIORARI

This case provides the Court an opportunity to address a conflict between the circuits regarding the proof of an exemption or exclusion under Section 203(o) of the Fair Labor Standards Act and a conflict with its own precedent regarding the proof of a "custom or practice" under a bona fide collective bargaining agreement generally.

a. The courts of appeals are divided on whether Section 203(o) is an avoidance provision, and thus an affirmative defense to be proven by an employer seeking an exemption from FLSA liability, or whether Section 203(o) is to be considered as an exception to the Act, and thus subject to the traditional burden of proof of the plaintiff. Rule 10(a), Rules of the Supreme Court.

b. The court of appeals below decided an important federal question in a way that conflicts

with relevant decisions of this Court. Rule 10(c), Rules of the Supreme Court. The Fifth Circuit's decision reflects a broad confusion in the lower courts over what constitutes a "custom or practice" under a collective bargaining agreement for the purposes of Section 203(o)'s exclusion from compensation. Specifically this Court has held that three elements are necessary to establish a custom or practice under a bona fide collective bargaining agreement as a matter of law: (1) time, (2) knowledge, and (3) acquiescence. *Detroit & Toledo Shore Line R.R. Co. v. United Transp. Union*, 396 U.S. 142, 154 (1969). The court of appeals abolished the latter two elements of this holding for defendants asserting customs or practices of nonpayment under FLSA Section 203(o). Pet. App. 16-17.

The court of appeals' judgment also calls into question the extent to which an alleged FLSA custom or practice of nonpayment may be maintained subsequent to an intervening decision of this Court, such as *Alvarez*, which alters the legal rights of employees and changes the scope of the FLSA continuous workday. An employee's decision whether to acquiescence to nonpayment for pre- and post-shift activities will likely differ after the scope of potentially compensable activities is enlarged, and it is not the court of appeals' place to make that choice for them by abolishing the defendant's obligation to prove the elements of knowledge and acquiescence.

1. The Courts of Appeals are Irreconcilably Divided on the Construction of Section 203(o) of the FLSA.

The Fifth Circuit expressly acknowledged the split between the circuits regarding the proper construction of Section 203(o) in its opinion. Pet. App. 18-20 (collecting and discussing the cases).

Section 203(o) provides that time spent in clothes changing is not to be included as work time for the purposes of the Act if a "custom or practice" nonpayment for the time has arisen under a bona fide collective bargaining agreement. If Section 203(o) is applied in this appeal to the employee petitioners, they cannot claim compensation for the time spent donning and doffing their personal protective gear. The proof of labor/management understandings related to clothes changing is at issue.

> A collective bargaining agreement is not an ordinary contract for the purchase of goods and services, nor is it governed by the same old common-law concepts, which control such private contracts. It is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate. The collective agreement covers the whole employment relationship. It calls into being a new common law—the common law of a particular industry or of a particular plant.

Transportation Union v. Union Pacific R. Co., 385 U.S. 157, 160-161 (1966).

The collective bargaining agreements here contain no express terms regarding compensation for donning and doffing personal protective equipment, and the Court is not called upon to interpret the agreements themselves. Rather, the issue is whether a "custom or practice" of nonpayment has been established and exists outside the four corners of the agreements, under the "common law" of the McWane foundries in this case.

The Fifth Circuit joining the Third and Eleventh Circuits, and in conflict with the Ninth Circuit, determined that Section 203(o) is an exception to the Fair Labor Standards Act. Pet. App. 18-20. If Section 203(o) is an exception to the FLSA, the employee petitioners must carry burden of proof at trial on the labor/management understandings. On the other hand, if Section 203(o) is an affirmative defense as the Ninth Circuit would have it, the employer respondent must carry the burden of proof at trial on the labor/management understandings.

As a party seeking dismissal based upon the application of an exception to the payment of overtime under the Fair Labor Standards Act, a claim traditionally based upon an affirmative defense, McWane must submit evidence establishing proof of the exemption. *See Idaho Sheet Metal Works, Inc. v. Wirtz*, 383 U.S. 190, 209 (1966) ("an employer asserting an affirmative defense to employee wage claims made pursuant to the FLSA

bears the burden of proving its affirmative defense at trial").

In this case, the issue was taken away from the factfinder, on summary judgment. The Court should resolve this split between the circuits, because the undisputed evidence contained in the record on appeal, discussed *supra*, at 6-7, is the same evidence that any set of employee plaintiffs would present at trial in response to a silent collective bargaining agreement. Specifically, that evidence is (1) a failure to pay, (2) a silent collective bargaining agreement, and (3) no discussion of payment among or between the employees and management. If the employer-defendant has no burden to present additional evidence to prove a "custom or practice" at trial, then the employer-defendant will always avoid trial--and judgment—on this issue.

2. The Fifth Circuit's Decision Incorrectly Interpreted Section 203(o) of the FLSA.

The issue of *who carries* the burden at trial, however, does not resolve the larger question of law, of *exactly what* the burden to prove a "custom or pratice" under a bona fide collective bargaining agreement is. Certiorari is therefore also warranted because the Fifth Circuit's decision as to what the test is conflicts with the test stated in this Court's precedent.

a. A Custom or Practice of Nonpayment Was Not Established as a Matter of Law.

The court of appeals' erroneous statement of the law relieves defendants of their obligation to prove knowledge and acquiescence to the alleged custom or practice of nonpayment under a bona fide collective bargaining agreement. McWane cannot unilaterally create circumstances which would entitle it to avoid compensating its employees for hours worked, but that is exactly what the court of appeals has permitted here. The court of appeals' judgment is contrary to prior decisions of this Court in that regard.

The elements necessary to prove such a "custom or practice" under a collective bargaining agreement as a matter of law are (1) time, (2) knowledge, and (3) acquiescence. *Detroit & Toledo Shore Line R.R. Co. v. United Transp. Union*, 396 U.S. 142, 154 (1969) (*Shore Line*).

> The mere fact that the collective agreement before us does not expressly prohibit outlying assignments would not have barred the railroad from ordering the assignments that gave rise to the present dispute if, apart from the agreement, such assignments had occurred for a sufficient period of *time* with the *knowledge* and *acquiescence* of

> the employees to become in reality a part of the actual working conditions.

Id. at 153-154 (emphasis added).

The court of appeals abolished the latter two elements of knowledge and acquiescence for defendants asserting customs or practices of nonpayment under FLSA Section 203(o). Pet. App. at 16-17. Inverting the summary judgment standard, the court of appeals openly *inferred* those elements in favor of the *movant*-defendant, McWane:

> Thus, as long as there was a company policy of non-compensation for time spent changing for a prolonged period of time—*allowing the court to infer that the union had knowledge of and acquiesced to the employer's policy*—and a [collective bargaining agreement] existed, the parties need not have explicitly discussed such compensation when negotiating the [collective bargaining agreement]. McWane "only need prove that the parties had a 'custom or practice' of non-compensation under the agreement."
>
> . . .
>
> It is undisputed that McWane has never compensated its employees for changing time, going as far back as 1965. After more than forty years of noncompensation, we may safely *infer* that McWane's employees had knowledge of and acquiesced to the

> policy of non-compensation. Therefore, we conclude that McWane has demonstrated a "custom" of non-compensation for changing time.

Pet. App. at 17 (emphasis added); *cf.* Rule 56(c), Fed. R. Civ. P. (2006) and *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) ("The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in [their] favor.") and Pet. App. 5 ("Additionally, we construe the FLSA liberally in favor of employees . . . .").

In effect, the court of appeals disregards this Court's legal test in *Shore Line*. Instead, it follows the similarly flawed reasoning in *Turner v. City of Philadelphia*, 262 F.3d 222 (3d Cir. 2001), and *Anderson v. Cagle's, Inc.*, 488 F.3d 945 (11th Cir. 2007), *cert. denied*, 128 S. Ct. 2902 (2008). Pet. App. 16. *Anderson* relies entirely on *Turner* for its reasoning. The petition for writ of certiorari in *Anderson* did not challenge the court of appeals' compliance with the *Shore Line* test.

In cases with the same undisputed facts of (1) a failure to pay, (2) a silent collective bargaining agreement, and (3) no discussion of payment among or between the employees and management, at least three district courts have noted that the reasoning in *Turner* does not appear to comport with the *Shore Line* test:

> The Court is unprepared to find that Kerry's six-year history of nonpayment for clothes-changing time, together with

> evidence that the union never complained about such nonpayment, is sufficient to establish, as a matter of law, a "custom or practice" of nonpayment under § 203(o). Indeed, to the extent that the union members never raised the issue even among themselves, this may suggest that they did not knowingly acquiesce in Kerry's policy of nonpayment for clothes-changing time. If an employer's nonpayment for clothes-changing time were sufficient, by itself, to establish a "custom or practice" under § 203(o), then § 203(o) would essentially be an unlimited FLSA exemption applicable to every unionized employer that did not pay for clothes-changing time. The Court does not believe that § 203(o) is so sweeping.

Kassa v. Kerry, Inc., 487 F. Supp. 2d 1063, 1071 (D. Minn. 2007).

> An employer may negotiate away its obligation to pay for donning, doffing and washing time by participating in the collective-bargaining process, but it cannot evade the requirements of the FLSA simply by establishing a history of ignoring them. If it were otherwise, the § 203(o) inquiry would be circular.

Figas v. Horsehead Corp., 2008 WL 4170043 at *15 (W. D. Pa.).

> *Turner* does not support defendant's position, because in *Turner*, although plaintiffs had apparently never raised a particular issue of compensation in formal collective bargaining negotiations, they had raised it in labor management meetings. . . . By contrast, in this case, there is no indication that plaintiffs ever raised the issue of compensation for donning and doffing until after the initiation of this lawsuit. *Defendant cites no binding authority providing that the circumstances presented in this case may establish a custom or practice as a matter of law, rather than simply raising the inference that plaintiffs were ignorant of their potential right to compensation.*

Valladon v. City of Oakland, 2009 WL 3401263 at *11 (N.D.Cal.) (emphasis added).

The only way for employees to waive payment for donning and doffing personal protective equipment is to do so in the manner provided for by law, i.e., by engaging in the labor/management negotiations or understandings authorized by Section 203(o). Yet by abolishing the evidentiary elements of knowledge and acquiescence, and approving the inference of those elements in the movant's favor on summary judgment, the court of appeals permits employers to establish customs or practices of nonpayment unilaterally, merely by refusing to pay for a "prolonged" period of time.

The inferred "evidence" of knowledge and acquiescence in such cases is always the same as it is here: (1) a failure to pay, (2) a silent collective bargaining agreement, and (3) no discussion of payment among or between the employees and management. Pet. App. at 4, 41-43. Indeed, Petitioners' evidence of lack of knowledge and non-acquiescence is the only competent evidence in the record on those elements. *Id.*

The court of appeals, by disregarding this Court's requirement to prove knowledge of and acquiescence to the custom or practice of nonpayment, has already assumed an agreement which the parties never in fact made or intended. And unless reversed, the agreement constructed by the court of appeals binds not only the Petitioners, but every employee of every employer that has not paid for donning and doffing personal protective equipment for a "prolonged" period of time under a silent collective bargaining agreement. Pet. App. 16.

b. The Importance of Section 203(o) to the American Workforce Compels Resolution by this Court.

Certiorari is warranted in light of the broad and important impact Section 203(o) has on workers and employers in large industries across the nation. More than 17 million Americans, both union and non-union members, are represented by unions in their employment. Bureau of Labor Statistics, *Union Members in 2008*, at 5 (Table 1), *available at* http://www.bls.gov/news.release/pdf/union2.pdf (last visited Apr. 7, 2010). Millions of these workers, from

a multitude of occupations ranging from firefighters to textile workers to miners, are required by law to don and doff protective equipment in the course of their regular work process.

> Protective equipment, including personal protective equipment for eyes, face, head, and extremities, protective clothing, respiratory devices, and protective shields and barriers, shall be provided, used, and maintained in a sanitary and reliable condition wherever it is necessary by reason of hazards of processes or environment, chemical hazards, radiological hazards, or mechanical irritants encountered in a manner capable of causing injury or impairment in the function of any part of the body through absorption, inhalation or physical contact.

29 C.F.R. § 1910.132(a) (2009) (OSHA standard).

Given the diversity and number of occupations involving the use of protective equipment, it is no surprise that the Supreme Court has previously been required to address the compensability of donning and doffing time in order to resolve other, related circuit splits under the FLSA. *See IBP v. Alvarez*, 546 U.S. 21 (2005); *Steiner v. Mitchell*, 350 U.S. 247 (1956). The vast numbers of affected employees makes donning and doffing a recurring issue in the lower courts. And the accumulated value of the time makes the compensability of such

time an issue of real importance to employees and employers alike.

Certiorari is especially warranted in light of the impact of this Court's decision upon the thousands of McWane employees who are collectively conditionally entitled to proceed with their FLSA claims against McWane pursuant to 29 U.S.C § 216(b). If the judgment of the court of appeals stands, these potential plaintiffs in a collective action will lose their right to pursue payment for their work.

c. The Scope of What Can Be Bargained For is Relevant to Determining Whether a "Custom or Practice" Exists as a Matter of Law.

The court of appeals assumed knowledge and acquiescence of the union representatives based on the receipt of nonpayment in the wages of individual employees. Pet. App. 17. *Shore Line*, and even the cases relied upon by the court of appeals, make clear that the conduct of individual employees and mere receipt of a paycheck is not the relevant inquiry.

Even if the court of appeals was correct that mere receipt of a paycheck that failed to pay for time spent donning and doffing personal protective equipment could establish knowledge and acquiescence to nonpayment by all employees, which is denied, it throws into sharp relief the court of appeals' underlying flawed premise: That whatever the employees knew and acquiesced to was constant.

In fact, even if it is believed that the employees of McWane in this case knew and acquiesced to a continuous workday that included nothing more than "whistle-to-whistle" time, it seems incongruous to believe that they would maintain that same knowledge and acquiescence in the face of this Court's 2005 holding in *Alvarez* announcing that the scope of the compensable workday had been significantly enlarged to include walking time and other "preliminary and postliminary" activities that, taken together, may have significant value to the employees on a weekly, monthly, and annual basis.

By abolishing two of the three elements of *Shore Line*'s evidentiary test for a "custom or practice," the court of appeals is effectively saying that a molten metal pourer who dons and doffs a hard hat, steel-toed boots, safety glasses, ear plugs, a face shield, gloves, apron, and flame resistant, aluminized clothing and then walks a quarter mile from the plant locker room to her work station and performs other preshift preparation and postshift cleanup activities would acquiesce to nonpayment for all of that time, post-*Alvarez*, as readily as she would acquiesce to nonpayment for ten minutes of clothes changing pre-*Alvarez*.

The court of appeals was wrong to infer, in all cases, that she would, and in so holding, failed to give effect to an intervening decision of this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated: April 8, 2010

Respectfully submitted,

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